IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JOSE VILLA, Plaintiff, v. BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, Defendant.	*	4:02-cv-90266 JURY INSTRUCTIONS

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Final Instructions

FINAL INSTRUCTION NO. 1 - EXPLANATORY

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

FINAL INSTRUCTION NO. 2 - STATEMENT OF THE CASE

Plaintiff Jose Villa claims that he injured his back on October 27, 1999 during the course of his employment as a laborer for Defendant Burlington Northern Santa Fe Railway Company.

Plaintiff claims that the Defendant was negligent and that such negligence caused his injuries. Plaintiff seeks money damages.

Defendant denies it was negligent and further claims that the Plaintiff was negligent and has failed to mitigate his damages.

This statement has been given to you by the Court solely to inform you, by way of summary, of the respective claims of the parties. Neither the claims made nor this instruction is to be considered by you as evidence in this case.

FINAL INSTRUCTION NO. 3 - SECTION 1 OF F.E.L.A.

Section 1 of the Federal Employers' Liability Act ("F.E.L.A."), 45 U.S.C. § 51, under which the Plaintiff claims the right to recover damages in this action, provides in part that

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . .

It is agreed that at the time and place alleged by Plaintiff, the Defendant was a common carrier by railroad, engaged in interstate commerce; that the Plaintiff, Jose Villa, was then an employee of the Defendant, engaged in such commerce; and that the Plaintiff's right, if any, to recover in this case is governed by the provisions of the Federal Employers' Liability Act.

FINAL INSTRUCTION NO. 4 - ACCIDENT ALONE

Proof of an accident alone does not constitute proof that a party was negligent.

FINAL INSTRUCTION NO. 5 - GENERAL F.E.L.A. NEGLIGENCE

Your verdict must be for Plaintiff Jose Villa and against Defendant Burlington Northern Santa Fe Railway Company on Plaintiff's claim if all of the following elements have been proved by a preponderance of the evidence:

First, Plaintiff Jose Villa was an employee of Defendant Burlington Northern Santa Fe Railway Company; and

Second, Defendant Burlington Northern Santa Fe Railway Company failed to provide:

Reasonably safe conditions for work, or

Reasonably safe tools and equipment, or

Reasonably safe methods of work in that it failed to properly set the hydraulic pressure at its source and/or properly install spikes which required manual pulling, or

Reasonably adequate help in it failed to properly instruct and brief employees, and

Third, Defendant Burlington Northern Santa Fe Railway Company in any one or more of the ways described in Paragraph *Second* was negligent, and

Fourth, such negligence resulted in whole or in part in injury to Plaintiff Jose Villa.

If any of the above elements has not been proved by a preponderance of the evidence, then your verdict must be for Defendant Burlington Northern Santa Fe Railway Company.

FINAL INSTRUCTION NO. 6 - "NEGLIGENCE" AND "ORDINARY CARE" DEFINED

The term "negligent" or "negligence" as used in these instructions means the failure to use ordinary care. The phrase "ordinary care" means that degree of care an ordinarily careful person would use under the same or similar circumstances. The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the harm that a person reasonably should foresee. In deciding whether a person was negligent, you must consider what that person knew or should have known and the harm that should reasonably have been foreseen.

FINAL INSTRUCTION NO. 7 - FAILURE TO PROVIDE SAFE PLACE TO WORK

To recover against Defendant Burlington Northern Santa Fe Railway Company on a theory that it failed to provide a safe place to work, the Plaintiff must demonstrate by a preponderance of the evidence both that the condition of which he complains was unsafe and that:

(a) An officer, employee, or agent of the railroad was responsible, through negligence, for the presence of the unsafe condition; or

(b) An officer, employee or agent of the railroad had actual knowledge of the presence of the unsafe condition before the accident; or

(c) The unsafe condition had continued for a sufficient length of time to justify the inference that failure to know about it and remove it was due to want of proper care.

FINAL INSTRUCTION NO. 8 - F.E.L.A. CAUSATION

For purposes of this action, injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you should find from the evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damage suffered by the Plaintiff, you may find that such injury or damage was caused by the Defendant's act or omission.

Stated another way, an act or omission is the cause of injury or damage if the injury or damage would not have happened but for the act or omission, even though the act or omission combined with other causes.

This does not mean that the law recognizes only one cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage. In such a case, each may be a cause for the purpose of determining liability.

FINAL INSTRUCTION NO. 9 - DEFENDANT'S DUTY OF ORDINARY CARE

It was the continuing duty of the Defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing the Plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the evidence in the case.

FINAL INSTRUCTION NO. 10 - SAFE AND SUITABLE TOOLS

While Defendant is not required to furnish the latest, best, and safest tools for its employees, Defendant does have a duty to use reasonable care to provide its employees, including Plaintiff, with reasonably safe and suitable tools with which to work.

FINAL INSTRUCTION NO. 11 - NEWER OR SAFER METHODS

The fact that there may have been a safer method that could have been employed or that danger may have been avoided if the act had been done in a different manner does not necessarily make an act negligent.

FINAL INSTRUCTION NO. 12 - AGENCY

Since a corporation can only act through its officers, or employees, or other agents, the burden is on the Plaintiff to establish, by a preponderance of the evidence in the case, that the negligence of one or more officers, or employees, or other agents of the Defendant was a cause of any injuries and consequent damages sustained by the Plaintiff.

Any negligent act or omission of an officer, or employee, or other agent of a corporation, in the performance of his duties, is held in law to be the negligence of the corporation.

FINAL INSTRUCTION NO. 13 - AGGRAVATION OF PRE-EXISTING INJURY OR CONDITION

If you find for Plaintiff, the Defendant is only liable for damages you find to be caused by the occurrence of October 27, 1999. If you find that Plaintiff had a pre-existing injury or condition which existed prior to October 27, 1999, and if you find that Plaintiff's pre-existing condition made him more susceptible to injury than a person in good health, the Defendant is still responsible for all injuries suffered by the Plaintiff as a result of the Defendant's negligence, even if those injuries are greater than would have been suffered by a person in good health under the same circumstances.

If you find that the Defendant's negligence caused further injury or aggravation to any pre-existing condition that you find Plaintiff had, Plaintiff is entitled to compensation for all of Plaintiff's damages caused by the incident of October 27, 1999, including any further injury or aggravation. If you cannot separate the pain or disability caused by the pre-existing condition from that caused by the occurrence of October 27, 1999, then the Defendant is liable for all of Plaintiff's injuries.

FINAL INSTRUCTION NO. 14 - SUBSEQUENT INJURIES OR MEDICAL EVENTS

If you find for Plaintiff, Plaintiff is only entitled to recover damages for injuries caused by the incident that occurred on October 27, 1999. Your award may not compensate Plaintiff for any stroke occurring after October 27, 1999. However, a stroke occurring after October 27, 1999 alone does not make Plaintiff ineligible for damages, unless you find by a preponderance of the evidence that Plaintiff has not proven that the damages were causally related to the October 27, 1999 incident.

FINAL INSTRUCTION NO. 15 - SECTION 3 OF F.E.L.A.: CONTRIBUTORY NEGLIGENCE

Section 3 of the Federal Employers' Liability Act, 45 U.S.C. § 53, provides in part that:

> In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

In addition to denying that any negligence of the Defendant caused any injury or damage to the Plaintiff, the Defendant alleges, as a further defense, that contributory negligence on the part of the Plaintiff himself was a cause of any injuries and consequent damages Plaintiff may have sustained. Contributory negligence is fault on the part of a person injured, which cooperates in some degree with the negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, the Defendant in effect alleges that, even if you find the Defendant guilty of some negligent act or omission which was one of the causes, the Plaintiff himself, by his own failure to use ordinary care under the circumstance for his own safety, at the time and place in question, also contributed as one of the causes of any injuries and consequent damages Plaintiff may have sustained.

The burden is on the Defendant, alleging the defense of contributory negligence, to establish, by a preponderance of the evidence in the case, the claim that the Plaintiff himself was also at fault, and that such fault contributed as one of the causes of any injuries and consequent damages Plaintiff may have sustained.

You may not find contributory negligence on the part of the Plaintiff, however, simply because

he acceded to the request or direction of responsible representatives of his employer that he work at a dangerous job, or in a dangerous place, or under unsafe conditions.

FINAL INSTRUCTION NO. 16 - PERCENTAGE OF CONTRIBUTORY NEGLIGENCE

If you find in favor of Plaintiff under Final Instruction No. 5, you must consider whether Plaintiff was also negligent. Under this instruction, you must assess a percentage of the total negligence to Plaintiff on his claim against Defendant if all of the following elements have been proven by a preponderance of the evidence:

First, that Plaintiff:

(1) Failed to examine the Stanley Hydraulic Spike Puller and/or the pressure settings prior to using the equipment; or

(2) Failed to review Safety Bulletins, manuals, and/or instructions on the Stanley Hydraulic Spike Puller before using the equipment; or

(3) Failed to inquire how to operate the Stanley Hydraulic Spike Puller if, in fact, he was unfamiliar with its operation; or

(4) Failed to exercise ordinary care under the circumstances for his own safety; and

Second, Plaintiff was thereby negligent, and

Third, such negligence of Plaintiff resulted in whole or in part in his injury.

If any of the above elements have not been proven by a preponderance of the evidence, then you must not assess a percentage of negligence to Plaintiff.

If you assess a percentage of negligence to Plaintiff by reason of this instruction, do not diminish the total amount of damages by the percentage of negligence you assess to Plaintiff. The Court will do this.

FINAL INSTRUCTION NO. 17 - ELEMENTS OF DAMAGES

If you find in favor of Plaintiff, then you must award Plaintiff such sum as you find by the preponderance of the evidence will fairly and justly compensate Plaintiff for any damages you find Plaintiff sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence. You should consider the following elements of damages:

(1) The physical pain and mental suffering Plaintiff has experienced and is reasonably certain to experience in the future; the nature and extent of the injury, whether the injury is temporary or permanent and whether any resulting disability is partial or total;

(2) The reasonable expense of medical care and supplies reasonably needed by and actually provided to the Plaintiff to date;

(3) The earnings Plaintiff has lost to date and the present value of earnings Plaintiff is reasonably certain to lose in the future; and

Remember that throughout your deliberations you must not engage in any speculation, guess, or conjecture. You are not to include in any verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future.

You are also not to award damages for any injury or condition from which the Plaintiff may have suffered or may now be suffering unless it has been established, by a preponderance of the evidence in the case, that such injury or condition was caused by the accident in question.

FINAL INSTRUCTION NO. 18 - MITIGATION OF DAMAGES

In fixing the amount of money which will reasonably and fairly compensate the Plaintiff, you are to consider that an injured person is under a duty to mitigate his damages; that is, to minimize the economic loss resulting from his injury by resuming gainful employment as soon as such can reasonably be done.

Failure of the injured party to make a reasonable effort to minimize his damages does not prevent all recovery for economic loss, but it does preclude recovery for damages or losses which could have been avoided had a reasonable effort to lessen damages been made.

Therefore, if Defendant proves by a preponderance of the evidence that the Plaintiff failed to make a reasonable effort to minimize his damages, then you must not award the Plaintiff any sum to compensate him for those damages which could have been avoided if Plaintiff had made a reasonable effort to minimize damages.

FINAL INSTRUCTION NO. 19 - INCOME TAX ON AWARD

The Plaintiff will not be required to pay any federal or state income taxes on any amount of money that you award.

FINAL INSTRUCTION NO. 20 - QUOTIENT VERDICT

In arriving at the amount of damages or any percentage of fault, if any you find, you may not return what is known as a "quotient verdict;" that is, your verdict cannot be arrived at by taking the estimate of each juror as to damages or percentage of fault and agreeing in advance that the average of such estimates shall stand as the verdict of the jury.

FINAL INSTRUCTION NO. 21 - ELECTION OF FOREPERSON; DUTY TO DELIBERATE

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

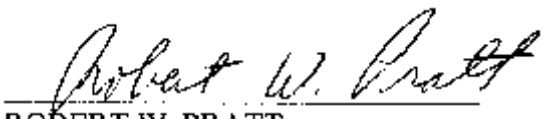
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to

suggest what your verdict should be - that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

Dated this ___14th___ day of January, 2004.



ROBERT W. PRATT
U.S. DISTRICT JUDGE